SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-849

EDWARD GRIMES,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioner, EDWARD GRIMES, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of California entered in the above matter.

on September 22, 1971.

OPINIONS BELOW

The written decision of the Department of Alcoholic Beverage Control suspending Petitioner's license for 45 days is set forth in Appendix A. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth in Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

Is the authority of the Department of Alcoholic Beverage Control overboard in violation of the First Amendment in that the Department may suspend or revoke a license for the presentation of entertainment which the Department finds to be contrary to public welfare or morals, without regard to whether or not the

entertainment is obscene."

STATUTORY PROVISIONS INVOLVED

Article XX, §22 of the Constitution of the State of California, which provices, in relevant part: "The department [of Alcoholic Beverage Control] shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals..."

Section 24200(a) of the California Business and Professions Code, which provides: "The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

> "(a) When the continuance of a license would be contrary to public welfare or morals..."

STATEMENT OF THE CASE

Petitioner has been and now is the holder of an on-sale beer license issued by the California Department of Alcoholic

Beverage Control (A.B.C.) for the premises located at 10809 South Vermont Avenue, Los Angeles, California. Said premises are known as and do business as "The Circle."

On October 7, 1969, an Accusation was filed with A.B.C. alleging that petitioner had on seven separate occasions suffered and permitted acts at his licensed premises which violated a condition imposed upon his license and which were also, independently, "contrary to public welfare or morals" in violation of Article XX, §22 of the California Constitution and §24200(a) of the Business and Professions Code.

On November 13, 1969, petitioner duly filed a notice of defense pursuant to the California Administrative Procedure Act.

A hearing was held on the accusation on February 19, 1970 before a hearing officer who made a proposed decision to the A.B.C. The proposed decision found all of the seven alleged events had taken place and that four of them violated the condition. Only one of the alleged

events was found to be contrary to public welfare or morals. The hearing officer recommended that A.B.C. revoke petitioner's license.

On August 13, 1970 the A.B.C. adopted the proposed decision except for the penalty, which was reduced to a total suspension of 45 days.

On September 14, 1970, the A.B.C. denied petitioner's petition for reconsideration.

On September 22, 1970, petitioner filed his notice of appeal to the Alcoholic Beverage Control Appeals Board. Briefs were filed by both sides and a hearing was held by the Appeals Board on February 23, 1971. On July 23, 1971 the Appeals Board issued a written decision affirming the suspension of petitioner's license by the A.B.C.

On August 19, 1971, petitioner filed a Petition for Writ of Review with the Court of Appeals of the State of California. The petition was denied without a hearing on August 23, 1971.

On September 2, 1971, petitioner

filed a petition for hearing in the Supreme Court of the State of California. A hearing was denied on September 22, 1971.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

A Statute Which Permits Suspension or Revocation of an Alcoholic Beverage License for Acts Contrary to Public Welfare or Morals is Unconstitutionally Broad When Applied to Entertainment and Dancing Protected by the First Amendment.

The accusation against petitioner alleged that on three occasions he had employed the services of a female entertainer who performed on a stage while completely nude and that on four occasions he had employed the services of female barmaids and waitresses whose breasts were exposed. The A.B.C. found that only one of the occasions was contrary to public welfare or morals,

however. A.B.C.'s findings as to that occasion are set forth in Count I, paragraph 3 of its decision, which is set forth in Appendix A.

Petitioner contends that the operative clause, "contrary to public welfare or morals" is unconstitutionally broad when applied, as here, to dancing and entertainment. Zwickler v. Koota, 389 U.S. 241; In re Giannini, 69 Cal.2d 573, 72 Cal.Rptr. 655 (1968), cert. den.

The phrase "contrary to public welfare or morals" has been construed very broadly by the California Supreme Court, which has defined public morals to mean the moral practices of the entire community, which can be ascertained by reference to the criminal law, administrative rules of the A.B.C., but which may also include acts not forbidden by law. Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control, 2 Cal.3d 85, 84 Cal.Rptr. 113 (1970). In both this and other cases, the A.B.C. has taken the position that it may impose discipline for nude entertainment without having to prove that the

entertainment is obscene. Therefore, the A.B.C. asserts the right to prohibit expression otherwise permitted by the First Amendment.

It follows, then, that Article XX, §22 of the California Constitution and §24200(a) of the California Business and Professions Code as applied herein are overbroad restraints on speech since they wholly lack the precision and "narrow specificity" required of such restraints. NAACP v. Button, 371 U.S. 415 (1963); United States v. O'Brien, 391 U.S. 367 (1968).

II

CONCLUSION

For the reasons stated herein the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McPHERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ,

Attorneys for Petitioner

APPENDIX "A"

APPENDIX A

STATE OF CALIFORNIA

DEPARTMENT OF

ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

File 30714
Reg. 9084

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issue and recommended penalty, adopted said proposed decision as its decision in the case therein described on August 13, 1970 except that said Department reduced the penalty from a revocation to a 15-day suspension on Count I and a 30-day suspension on Count II, said suspensions to be served consecutively for a total of 45 days.

A representative of the Department will call on you on or after October 1, 1970 to pick up the license certificate.

Sacramento, California
Dated: August 13, 1970

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-185 (8-65)

APPENDIX "B"

APPENDIX "B"

Filed Jul. 23, 1971
Alcoholic Beverage
Control Appeals Board

EXHIBIT B

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against

EDWARD GRIMES
dba The Circle
10809 South Vermont Avenue
Los Angeles, California

Respondent & Licensee

under the Alcoholic Beverage Control Act.

AB-3521

File No. 30814;
Reg. No. 9084

Time & Place of Hearing:
February 23, 1971, at 2 p.m.
107 South Broadway
Los Angeles, California

For Department:
Honorable Evelle J. Younger
Attorney General
Mark Leicester
Deputy Attorney General

For Appellant:
Kenneth Scholtz, Esq.

Appellant Edward Grimes, doing business as The Circle, has appealed the decision of the Department of Alcoholic Beverage Control that appellant's license be revoked pursuant to article XX, section 22 of the State Constitution, and sections

24200(a) and (b) of the Business and Professions Code.

Appellant filed a petition for reconsideration on the grounds (1) that the decision of the hearing officer of the Office of Administrative Procedure is not supported by the evidence in the case; (2) that errors of law were made by the hearing officer as reflected by the transcript of the proceedings; and (3) that the suspension of the license is excessive and that in lieu thereof a fine should be levied. The department denied said petition on September 14, 1970.

The appeal before this board is based upon the following grounds:

> "(a) The Department has proceeded without, and in excess of its jurisdiction;
>
> "(b) The decision is not supported by the findings;
>
> "(c) That errors of law were made by the Hearing Officer as reflected by the transcript of the proceedings;
>
> "(d) The findings are not supported by substantial evidence in the light of the whole record."

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"Within one year last past respondent-licensee directly and through his employees permitted the following acts, conduct and conditions to exist on the above-designated premises:

"1. On or about August 30, 1969, respondent did use the services of a female entertainer, Kathleen Walker, to perform on the stage area of the above-designated licensed premises, while completely nude, thereby indecently exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

"2. On or about September 7, 1969, respondent did use the services of a female entertainer, Ruth Ann Richard, to perform on the stage area of the above-designated licensed premises, while completely nude, thereby indecently exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

"3. On or about September 10, 1969, respondent did use the services of a female entertainer, Ruth Ann Richard, to perform on the stage area of the above-designated licensed premises, while completely nude, thereby indecently exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

"During said performance and before the said Ruth Ann Richard had completely disrobed, unknown male patrons shouted and made comments such as 'Hey, Rosie Cheeks, take off that fucking thing and let it all out' and 'Let me see that Brillo pad,' all of which was accompanied by much laughter and clapping of hands by patrons present.

"Also during said performance, the said Ruth Ann Richard did, while completely disrobed, turn her back, bend forward, place her hands on her bare buttocks, stretching them apart displaying her anal opening to the patrons present, some of whom were within three feet of the said performer.

"4. On or about September 7, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of a female, Mary Frances Crawford, and did permit and suffer the said female to tend bar and wait on

patrons while attired in a brief 'G-string' bottom covering only her pubic area, with her breasts fully exposed.

"5. On or about September 10, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of a female, Mary Frances Crawford, and did permit and suffer the said female to tend bar and wait on patrons while attired in a costume which fully exposed her breasts.

"6. On or about September 13, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of two females, Mary Frances Crawford, and Ruth Ann Richard, and did permit and suffer the said females to wait on patrons while attired in brief 'G-string' bottoms covering only their pubic areas, with their breasts fully exposed.

"7. On or about September 24, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of two females, Patricia Curry and Mary Frances Crawford, and did permit and suffer the said females to wait on patrons while attired in brief bikini panties with their breasts fully exposed.

"COUNT II

"The above-designated license was issued to the respondent licensee for the above-designated licensed premises subject to the following conditions:

"'That Edward Grimes shall not employ the services of any female who exposes her bare breasts or bare buttocks or wears any manner of costume through which bare breasts or buttocks may be observed while performing any type of service within or upon the licensed premises when commingling with or waiting upon patrons.

"'Scantily clad entertainers will confine themselves to the stage area and not mingle with patrons. Other employees, such as waitresses, fashion models or independent contractors will be properly clothed, with topless or bottomless garments or other garb stressing nudity or near nudity being unacceptable.'

"DETERMINATION OF ISSUES PRESENTED:

"Count I, Subcounts 1, 2, 4, 5, 6 and 7: Grounds for disciplinary action were not established under Article XX, Section 22 of the State Constitution and Section 24200(a) of the Business and Professions Code.

"Count I, Subcount 3: Respondent violated Section 24200(a) of the Business and Professions Code.

"Count II: Respondent violated Section 23804 of the Business and Professions Code.

"Grounds for suspension or revocation of respondent's license were established under Article XX, section 22 of the State Constitution and Sections 24200(a) and (b) of the Business and Professions Code and under the findings herein."

Based on the department's decision, this appeal is limited to subcount 3 of Count I, determined to be a violation of section 24200(a) of the Business and Professions Code and count II, held to be a violation of section 23804 of the Business and Professions Code (violation of a condition placed upon a license).

Appellant concedes that the record contains substantial evidence supportive of the department's findings. (Appellant's opening brief, p. 1.) Accordingly, there is no need to set forth such evidence in this decision.

In his appeal, appellant raises the following issues:

(1) The condition imposed upon appellant's license was not valid and could not be used as a ground for disciplinary action.

(2) The provisions of article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code, which permit the department to revoke a license for conduct "contrary to public welfare or morals", are unconstitutionally broad when applied to speech and expression protected by the First Amendment, as in paragraph 3, count I, of the accusation herein.

(3) The decision of the department is not supported by substantial evidence in light of the whole record or the findings in that neither the findings nor the evidence contained facts tending to show that the acts complained of were contrary to public welfare or morals or that the acts set forth in the first three paragraphs of count I were contrary to the conditions imposed upon appellant's license.

We find no merit in appellant's

argument that the condition imposed upon appellant's license was not valid. The record shows that on or about December 15, 1967, appellant did petition for a conditional license and such license issued on or about December 26, 1967.

For the record, we would point out that section 23800 of the Business and Professions Code (license conditions) clearly delineates that conditions are imposed upon request of the licensee and that such conditions may cover any matter relating to the privileges exercised under license, conduct of the business, or the condition of the premises, which will protect public welfare or morals. (Section 23801, Business and Professions Code.) Appellant petitioned for a conditional license; i.e., voluntarily relinquished his right to appeal, and knowingly agreed to the terms affecting operations on the licensed premises. Consequently, there is no merit in appellant's contentions that the condition imposed was invalid and

consequently may not serve as a basis for disciplinary action.

This board in numerous previous decisions has passed upon the question here raised by appellant as to the constitutionality of article XX, section 22, when applied to speech and expression protected by the First Amendment. In passing upon appeals involving conduct similar to that set forth in the instant findings (subcount 3), we have stated that such cases belong to a classification which this board has held to be within the ambit of close regulation by the department on the basis of article XX, section 22 of the California Constitution.

It is the opinion of this board that in the instant matter, the Director, in determining that the entertainer's conduct was contrary to public welfare or morals, drew a legal inference from undisputed facts. His determination was not erroneous as a matter of law. Furthermore, it is our opinion that no

reasonable person could claim that the entertainers and patrons (subcount 3) have a constitutional right to engage in such conduct in a beer bar.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
July 23, 1971